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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHAE CHANG, Defendant and Appellant.	B230281 (Los Angeles County Super. Ct. No. LA059389)

APPEAL from a judgment of the Superior Court of Los Angeles County. Martin Herscovitz, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

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After jury trial, appellant Chae Chang was convicted of two counts of forcible rape (Pen. Code, § 261, subd. (a)(2)),[1] making criminal threats (§ 422), possession of a firearm by a felon (§ 12021, subd. (a)(1)), corporal injury to a cohabitant (§ 288a, subd. (c)(2)) and sexual penetration by a foreign object (§ 289, subd. (a)(1)). The jury deadlocked on a charge of forcible oral copulation, and the trial court dismissed that charge.

The information also alleged that appellant had a prior serious felony conviction (§ 667, subd. (a)(1)) and a prior "strike" conviction (§§ 667, subds. (b)-(i), 1170.2, subds. (a)-(d)). In a bifurcated proceeding, appellant admitted those allegations.

The trial court granted appellant's motion to dismiss his prior strike conviction and sentenced him to a total of 24 years in state prison.

This appeal followed. Appellant contends that the convictions are reversible per se due to *Wheeler/Batson* error, and that the trial court erred when it allowed the prosecution to introduce evidence of prior acts of domestic violence, denied his motion for mistrial based on a discovery violation, and denied his motion for new trial based on incompetence of counsel. We affirm.

FACTS[2]

These crimes took place on June 28, 2008. The victim was Julie K., with whom appellant had lived since September or October of 2002. Julie K. had four children. At the time she and her children moved in with appellant, the children were 14, 12, 6, and 4 years old.

Julie K. testified about numerous acts of violence by appellant during their relationship. He had punched her, pushed her, jumped on her chest, pulled her hair, thrown her down, pounded her head into the floor, and more. On a number of occasions, he told her that if she called police or did other than what he told her to do, he would kill

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] There is no challenge to the sufficiency of the evidence, and our summary of the facts is limited to facts relevant to the appeal.

her or her children. At one point he said that if she did anything "she wasn't supposed to be doing," he would give her name and picture, and her children's names and pictures, to "thugs" he had met in jail. They would follow her and "take care of it." He also threatened her friends.

By June of 2008, Julie K. had decided to move out of the house she shared with appellant. Appellant knew this. On June 28, he violently attacked her, saying that she had slept with a man she had recently met and with whom she had exchanged text messages. When she fought back, appellant crammed his finger into her vagina and threatened her, saying, "my dick's going to be the last one in you." Julie K. believed that appellant meant that he would kill her. Then appellant said that he was going to rape her, and proceeded to do so.

After an interval, appellant raped her again. Appellant then left the house and went to a guest house on the property, where he had an office.

Julie K. was afraid to call the police. The driveway was visible from the guest house, and she believed that appellant would see them arrive. She wanted a friend to come and "diffuse the situation," so that she and her children could safely leave.

Julie K.'s eighteen year old daughter, Paige K., was at home during these events, and for part of the time, a friend was with her. After appellant went to his office, Julie K. went to Paige's room and told Paige and her friend that appellant had beaten her, and later said that he had also raped her. Paige's friend took pictures of Julie K.'s injuries. The jury saw those photographs.

Julie K. asked Paige's assistance in making phone calls for help. She told her not to call police, because if she did, appellant would kill them. Paige testified to these events, and testified that she saw her mother's black eye and bleeding lip, and a bruise on her neck.

Julie K. also called her brother, Don C., and said that she had been beaten and raped by appellant. She said that she could not call the police, because appellant would kill her and the children either when police arrived or as soon as he was released from

custody. Don C. described her demeanor as "absolutely horrified," and "scared to death." He called police.

The jury heard the tape of Don C.'s 911 call to the police, and of Julie K.'s own conversation with police officers, when they called her after obtaining her cell phone number from her brother.

Julie K.'s younger son was at home during these events. He testified that he heard loud thumps and screaming from the master bedroom. Julie K.'s younger daughter was at home for part of the time, though at one point she left with a friend. She testified that she heard her mother crying and heard appellant screaming.

A sexual assault examination revealed that Julie K. had suffered injuries to her face, body, and vaginal area. A sexual assault nurse examiner who examined her opined that the injuries were consistent with nonconsensual sex.

Several witnesses, whose testimony is detailed later in this opinion, testified about appellant's prior acts of domestic violence.

The defense was that appellant and Julie K. had argued about her relationship with the man with whom she had exchanged text messages, that the two engaged in consensual sex in an effort to maintain the relationship, but that appellant finally decided that he wished to end the relationship and asked Julie K. to move out of the house, which he owned. In response, Julie K., who was concerned with her financial well-being, fabricated the charges and the history of abuse.

The defense introduced evidence in support of this theory, including evidence of Julie K.'s and appellant's financial arrangements, expert evidence that Julie K.'s injuries were consistent with consensual or forced sex, and evidence of Julie K.'s behavior after June 28, which, according to the defense, showed lack of fear and included false and vindictive statements to friends, appellant's business associates, and others. The defense also extensively cross-examined Julie K. and other prosecution witnesses on Julie K'.s opportunities to leave the house or to obtain help during the June 28 events; on her children's behavior, which included leaving the house; on the history of abuse, and other matters.

DISCUSSION

1. *Wheeler/Batson*

The law

Both the federal and state Constitutions prohibit an advocate's use of peremptory challenges to exclude prospective jurors based on race. (*People v. Lenix* (2008) 44 Cal.4th 602, 612–613.)

On a motion raising this issue, the trial court engages in a three-step inquiry. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*People v. Lenix*, *supra*, 44 Cal.4th at pp. 612–613.)

In order to make a prima facie showing, a litigant must show "a strong likelihood" of bias, and must do so by producing evidence sufficient to permit the trial judge to draw an inference that the challenge was discriminatory. "Inference" means a conclusion reached by considering other facts and deducing a logical consequence from them. (*People v. Gray* (2005) 37 Cal.4th 168, 186.)

When a trial court denies the motion because it finds that no prima facie case of group bias was established, on review, we consider the entire record of voir dire. If the record suggests grounds on which the prosecutor might reasonably have challenged the juror in question, we affirm. (*People v. Gray*, *supra*, 37 Cal.4th at p. 186.)

The facts

In voir dire by the court, Juror 16 told the court and counsel that she was a chemist for a pharmaceutical company, was not married, and had no children. After the prosecutor exercised a preemptory challenge against her, appellant made a *Wheeler/Batson* motion. Defense counsel said, "I think she's Asian. She may or may not identify with the family . . . ." The court noted that Juror 16 was the only Asian

prospective juror the prosecutor had challenged and found that one challenge was an insufficient basis for the motion. The court also noted that the prosecutor's other challenges were against an African-American and an Hispanic.

However, "for purposes of the record," the court asked the prosecutor to state her reasons for the challenge. The prosecutor said, "I thought she was somewhat of a blank slate. She wasn't very, you know, active in the participation of the questioning; the fact that she's you know, single, no kids. I wanted someone on a case like this with a little bit more experience." The court ruled that that was a race-neutral reason, and denied the motion.

The court re-visited that ruling the next morning, clarifying that the court's ruling was that the defense had not made a prima facie case, that the request that the prosecutor give an explanation was for the record only, and that on further reflection, considering the facts of the case and Juror 16's background, the court accepted the prosecutor's race-neutral explanation. In response, the prosecutor noted that Jurors 10 and 11 were Asian, and were still on the jury.

Later, defense counsel further argued the motion by citing case law for the proposition that a single challenge can be the basis for a *Wheeler-Batson* motion. The court again denied the motion, finding "based upon [the prosecutor's] pattern of dismissing only three jurors from three different ethnic backgrounds, I do not find a prima facie case."

Discussion

Appellant argues that the trial court in fact ruled on the issue of intentional discrimination, but did so without an analysis under *Batson*'s step three, that is, without an evaluation of the genuineness of the prosecutor's explanation. Thus, appellant contends, the court erred.

We see the record differently. The court based its denial of appellant's motion on its finding that appellant did not make a prima facie case of discrimination. The fact that the court asked the prosecutor for an explanation does not change that. Our Supreme Court has suggested that "Though not strictly required, it is the better practice for the trial

court to have the prosecution put on the record its race-neutral explanation for any contested peremptory challenge, even when the trial court may ultimately conclude no prima facie case has been made out." (*People v. Bonilla* (2007) 41 Cal.4th 313, 343, fn. 13.)

Moreover, as respondent argues, there is ample evidence to support the finding that appellant did not make a prima facie case. All appellant did was establish the challenged juror was a member of a cognizable group. That is simply not enough. (*People v. Bell* (2007) 40 Cal.4th 582, 598.)

Nor are we persuaded by appellant's contention that the prosecutor's acts with regard to other jurors establishes that her challenge to Juror 16 was based on race. Appellant argues that Jurors 18, 27, 28, and 47 were similarly young, single, and inexperienced, and were not challenged by the prosecutor.

We do not so read the record. Juror 28 was challenged for cause, after telling the court that she had twice been the victim of sexual assault as a teenager, and did not think that she could be unbiased. There is no evidence that the other jurors were comparable in age to Juror 16, only that all the jurors were single, that one (Juror 18) lived with a roommate, and one (Juror 27) lived with his/her parents.

At any rate, Juror 16 was not excused based solely on age, but on her demeanor, a legitimate ground for excusal. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613 [prospective juror may be excused based on facial expressions, gestures, hunches].)

2. Prior acts of domestic violence

Appellant contends that his right to due process was violated when the court admitted Kelly K.'s and Kathryn K.'s testimony about his prior acts of domestic violence.

The law

Under Evidence Code section 1109, ". . . in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

As appellant seems to acknowledge, many courts of appeal have found that the admission of prior acts of domestic violence under the restrictions found in Evidence Code section 1109 does not violate a criminal defendant's right to due process. (See *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704, *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096 and the cases collected therein.) We agree with the reasoning and result of those cases.

Appellant contends, however, that the trial court abused its discretion in admitting this evidence, that is, in finding that the evidence was not barred by Evidence Code section 352. (*People v. Cabrera*, *supra*, 152 Cal.App.4th at p. 704.)

The facts[3]

Kelly K. testified that she dated appellant from 2000 to 2002. She described several incidents in which appellant hit her, shoved her, twisted her arm, and threatened her, saying, for instance, that he would "fuck up her world." In one incident, appellant became upset because she had had a drink with a neighbor. Appellant came into her house, pushed her into the bedroom, smashed her face, pulled her hair, punched her, tried to suffocate her with a pillow, and bit her ear. When Kelly K. became pregnant, appellant "verbally abused her into getting an abortion." The second time she became pregnant, appellant was violent with her during her pregnancy. He would twist her arm or her breast. Once, after she called his business (at that point, a tanning salon) and spoke to his children, he threatened her son and told her that he had beaten a girlfriend to a pulp and killed her small dog by snapping its neck.

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[3] On this issue, the prosecutor also sought to call two other women who had dated appellant at earlier times, and appellant's sister, who in 2003 had obtained a restraining order against appellant on allegations that he had punched her and threatened to kill her. The trial court excluded the testimony of the first two prospective witnesses as remote in time, and excluded appellant's sister because she was not a domestic partner, but noted that the evidence might be admissible if appellant's sister testified on other issues. Appellant's sister testified for the defense on her attempts to evict Julie K. from appellant's house, and on cross-examination testified concerning the restraining order.

A former coworker of Kelly K.'s testified that while Kelly K. and appellant were dating, Kelly K. would have marks and bruises on her, so that "you can just tell she's been in some kind of altercation." A former neighbor of Kelly K.'s described an incident in which Kelly K. came to her door, frightened and with blood on her face, and told police that appellant had hit her.

Kathryn K. testified that she had dated appellant for about four months in 1999. She stopped seeing him after the following incident: he invited her to a party. When she arrived, she discovered that the party involved public sexual activity. Kathryn K. told appellant that she wanted to leave. He said that she could not leave, then restrained her. She struggled, and he hit her in the face hard enough to give her a black eye and a cut on the nose. He then held her down on a bed, with her arm wrenched in back of her, and told her "you had better settle down." She pretended to cooperate. When he let go, she hit him in the face and ran.

Discussion

Appellant argues that Kelly K.'s and Kathryn K.'s testimony concerned acts which were remote in time, was confusing and misleading, and was highly inflammatory and unduly prejudicial, so that the jury could not dispassionately evaluate Julie K.'s credibility and would be left with the impression but that appellant should be convicted "no matter what."

We cannot see that the trial court abused its discretion.

The witnesses certainly described repellant acts, but it is not too much to say that any act relevant to the issues in the case would be repellant. For purposes of Evidence Code section 352, "prejudicial" is not synonymous with "damaging." (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

Instead, "[r]elevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s)." (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

Here, the acts took place only a few years before appellant and Julie K. began their relationship and thus were not particularly remote in time. Nor were they more inflammatory than the acts charged in this case, and in the context of the case as a whole, were not particularly inflammatory.

As the trial court found when it made its ruling, neither witness required medical attention for the injuries allegedly inflicted by appellant, or called law enforcement. Julie K. testified to a number of acts and incidents as bad or worse than those described by Kelly K. and Kathryn K. For instance, she testified that at one point in their relationship, appellant told her "You better understand, this is war. I'm going to fuck you up. I'm going to mess with your finances. I'm going to mess up your kids. I'm going to have the girls raped. I'm going to have them beaten. I'm going to have the bones on [Julie K.'s son's] body broken. You will be very sorry, and I'll get you later when you're not looking. This is war, and you're not going anywhere."

Finally, as respondent argues, the jury deadlocked on one of the charges, indicating that it was not determined to convict "no matter what," but instead evaluated the credibility of Julie K. and the other witnesses.

3. The motion for mistrial

The law

"'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) Thus, "In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard." (*Ibid.*)

The facts

The motion arose from Kelly K.'s testimony that appellant had told her that he had beaten a girlfriend "to a pulp" and killed her dog. It was conceded that Kelly K. gave that

information to the police, that it was not turned over to the defense, and that it should have been turned over.

In his motion for mistrial, appellant argued that the defense had been prejudiced by a lack of opportunity to object to the testimony. The court denied the motion, finding that appellant had not been prejudiced, that under an Evidence Code section 352 analysis, "a threat or an admission that you killed a dog, compared to a repeated rape and other forcible sex crimes against an adult eight years later, pales in comparison."

Defense counsel then asked that the jury be admonished concerning the late discovery. The court agreed to give the instruction, and did so.

Discussion

Appellant argues that given the public's affection for animals, and loathing of those who engage cruelty to them, he was fatally prejudiced by a lack of opportunity to object to, and exclude, the evidence. He notes, too, that one of the jurors ran several dog grooming businesses.

We cannot agree. The jury had evidence that appellant engaged in numerous violent and cruel acts, beating and raping women he was in intimate relationships with. He hit his own sister. He made threats, including a threat to have young girls raped. Given that evidence, and the strength of the prosecution's case in general, a single witness's statement that appellant had said that he had also been cruel to an animal was not prejudicial.

4. The motion for new trial

The law

A motion for new trial may be based on ineffective assistance of counsel. (*People v. Fosselman* (1983) 33 Cal.3d 572, 582.) On such a claim, a defendant must establish both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's professional errors, a determination more favorable to defendant would have resulted. If the defendant makes an insufficient showing on either one of these components, the ineffective assistance

claim fails. On review, we give great deference to counsel's tactical decisions. (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

Facts

During the defense case, defense counsel told the court that appellant wished to testify, and sought rulings from the court on matters that might be admitted in impeachment, if he did so. The court heard argument about a number of witnesses the prosecutor had under subpoena, and ruled that appellant could be impeached with the evidence that he had stolen hundreds of thousands of dollars of products from an employer in 2001, prior misdemeanor theft convictions, and evidence about domestic violence against another, earlier, girlfriend.

Defense counsel then advised the court that appellant would like to have a discussion with the court about his choice to testify. The court informed appellant that it could not advise him, and appellant then asked for five minutes to further discuss the matter with counsel. After that break, the court asked appellant about his decision. Defense counsel advised the court that appellant had decided not to testify, and the defense rested.

After the verdict, through new counsel, appellant moved for a new trial on the ground of ineffective assistance of counsel, citing the advice that he not testify, which, according to new counsel, was based on false assurances that the defense was going to prevail and that his testimony was not needed.

The trial court denied the motion, noting that "I can think of a hundred reasons why the defendant did not testify in this case. Advising someone not to testify could be for as simple a reason as, 'I don't think you may be a very good witness,' or 'there may be some things coming out.' That's why it's a personal right. She explains the pros, the cons; he makes his own call. He made his own call."

Discussion

Appellant argues that counsel's assistance was ineffective in that he was misadvised of the risk of testifying, contending that the jury had already heard so much

evidence about his prior acts of violence that there was no reason for him not to testify. He contends that he was prejudiced because the jury never heard his side of the story.

On this record, appellant has not established incompetence. As respondent argues, there were indeed risks to appellant if he testified. The jury would have heard additional evidence about his history of violent acts, and would have also learned that he was dishonest, a point of potentially great importance when his credibility was at stake. Moreover, as the trial court observed, advice not to testify could have been based on counsel's evaluation of appellant's demeanor, and his probable effect on the jury.

Disposition

The judgment is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.